

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIE ANTOINETTE WALLACE,

Defendant-Appellant.

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UNPUBLISHED

April 25, 2006

No. 259719

Wayne Circuit Court

LC No. 04-006924-01

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

A jury convicted defendant Marie Wallace of two counts of possession of a fraudulent or altered financial transaction device.<sup>1</sup> The trial court sentenced Wallace to two years' probation for the convictions. Wallace appeals as of right. We affirm.

I. Basic Facts And Procedural History

The relevant events took place at a Double Tree Hotel in Romulus, Michigan. Danyelle Malloy was working at the front desk when a woman, using the name Tamara Smith, rented several rooms with a fraudulent MasterCard. The following day, when the MasterCard had exceeded its credit limit, John Marler, the hotel's office manager, met with the woman who called herself Smith. The woman gave Marler her driver's license and a Visa card in the name of Tamara Smith to cover the additional charges. Suspecting fraud, Marler took the Visa and the driver's license to his office where he made copies of both. When he returned to the front desk, the woman was gone. Several persons were seen running from the Smith rooms to their vehicles. Marler was able to note some vehicle descriptions and license plate numbers. None of the vehicles were registered to Tamara Smith, but one of the vehicles was registered in Wallace's name.

The parties stipulated that the MasterCard was used without the true cardholder's permission. The Visa card did not have any information on the magnetic strip, and the issuer did not have any record of the account ever existing.

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<sup>1</sup> MCL 750.157n(2).

## II. Pretrial Identification

### A. Standard Of Review

Two hotel employees, Danyelle Malloy and Kathie Henderson, were able to identify Wallace's photograph from a photographic lineup after the incident occurred. Wallace argues that the identification procedure was impermissibly suggestive and tainted the witnesses' subsequent in-court identifications of her, thereby denying her due process. We review de novo the trial court's ultimate decision with regard to a motion to suppress; however, we review for clear error the trial court's findings of fact in deciding the motion.<sup>2</sup> "A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made."<sup>3</sup> Erroneously admitted identification testimony will warrant "reversal only when the error is not harmless beyond a reasonable doubt."<sup>4</sup>

### B. Legal Standards

The pretrial identification of a defendant violates due process where the procedure "was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification."<sup>5</sup> When examining the totality of the circumstances, courts look at several factors including: (1) the witnesses' opportunity to view the criminal at the time of the crime; (2) the witnesses' degree of attention; (3) the accuracy of the witnesses' prior description; (4) the witnesses' level of certainty during the pretrial identification; and (5) the length of time between the crime and the identification.<sup>6</sup> Not all of these factors will be relevant in every case; a court can put varying levels of weight on different factors.<sup>7</sup> In addition, the court is free to consider other relevant factors when evaluating the validity of the identification procedure.<sup>8</sup> Moreover, just because the lineup procedure was suggestive does not necessarily mean that it was constitutionally defective.<sup>9</sup>

### C. Malloy's Statement

Wallace argues that Malloy's statement that the perpetrator was in the photographic lineup tainted Henderson's pretrial identification of her. Malloy was standing near Henderson at the time of the lineup and, before Henderson identified the perpetrator, Malloy stated that she

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<sup>2</sup> *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

<sup>3</sup> *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

<sup>4</sup> *People v Hampton*, 138 Mich App 235, 239; 361 NW2d 3 (1984); see *McElhaney*, *supra* at 288.

<sup>5</sup> *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

<sup>6</sup> *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

<sup>7</sup> *People v Gray*, 457 Mich 107, 117 n 12; 577 NW2d 92 (1998).

<sup>8</sup> *Id.*

<sup>9</sup> *Colon*, *supra* at 304.

knew which photograph was of the person who committed the crime. However, Malloy did not state or point to whom she thought the perpetrator was. All that Henderson knew at the time of her identification was that Malloy thought that the perpetrator's photograph was in the lineup. Henderson testified that she recognized Wallace's picture on her own without any prompting from Malloy or from Detective Dennis Felice, who administered the lineup.

After considering the totality of the circumstances, we conclude Henderson's pretrial identification was not so impermissibly suggestive that it led to a substantial likelihood of misidentification. Referring to the *Colon* factors, factors one and five weigh in favor of finding that the pretrial identification was not impermissibly suggestive. Henderson had the opportunity to see Wallace when she was working because Wallace spoke directly to her to ask for some sort of assistance. In addition, the length of time between the crime and the identification was only a "couple of days." Contrastingly, the second, third, and fourth *Colon* factors arguably weigh in favor of finding that the lineup was impermissibly suggestive. First, the degree of attention that Henderson gave to Wallace was likely minimal due to the fact that she could not recall what Wallace had needed and the transaction was very routine in nature. Second, the testimony suggests that Henderson never described the perpetrator as having a scarf on her head to anyone prior to the trial. Finally, Henderson testified that she was not absolutely positive in her initial identification of Wallace. However, we note that her tentative initial identification of Wallace, alone, would not be dispositive; mere tentativeness affects the weight of the evidence, not its admissibility.<sup>10</sup>

While these factors weigh both in favor of and against Henderson's identification of Wallace, the trial court had the discretion to give certain factors more weight than others.<sup>11</sup> The only suggestive aspect of the identification was that Malloy stated that the perpetrator was featured in the lineup before Henderson made her identification. However, case law makes clear that this, by itself, does not make the lineup unduly suggestive.<sup>12</sup> The trial court could have exercised its discretion and placed significant weight on the fact that Henderson had the opportunity to interact with Wallace face-to-face and the fact that the identification was made only a "couple of days" after the incident. In reviewing the trial court's decision for clear error, we cannot say that we are left with a definite and firm conviction that the court made a mistake in admitting Henderson's pretrial identification of Wallace.

#### D. Malloy's Identification

Wallace argues that Malloy's pretrial identification of her was tainted because Malloy saw and heard Henderson identify Wallace's picture. While this fact could be considered suggestive, "[t]he relevant inquiry . . . is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification."<sup>13</sup> Here, referring again to the *Colon* factors, all of the factors weigh in favor of

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<sup>10</sup> *Gray, supra* at 122.

<sup>11</sup> *Id.* at 117 n 12.

<sup>12</sup> *McElhaney, supra* at 287.

<sup>13</sup> *Kuryleczyk, supra* at 306.

finding that Malloy's pretrial identification was not impermissibly suggestive. First, Malloy had a face-to-face interaction with Wallace for five to ten minutes while completing the hotel check-in process. Second, Malloy's degree of attention appeared relatively high given her ability to recall several details about the interaction. Third, the record does not suggest that Malloy's prior description was inaccurate. Fourth, Officer Felice testified that, during the lineup, Malloy was "extremely positive" of who the perpetrator was. Finally, the length of time between the crime and the initial identification was only a "couple of days."

Further, Officers Felice and Henderson both testified that Malloy stated that she knew who the perpetrator was *before* Henderson identified Wallace's photograph. Moreover, Malloy expressed no hesitation in her identification of Wallace's photograph even after Henderson stated that she was not completely positive in her identification. Thus, it was not clear error for the trial court to find that Malloy's pretrial identification of Wallace was valid and admissible.

#### E. Independent Basis

Finally, even if Henderson's or Malloy's pretrial identification of Wallace was impermissibly suggestive, this Court will not reverse a verdict as long as there was an independent basis for the subsequent in-court identification of the defendant.<sup>14</sup> When evaluating whether there was an independent basis, a court looks at several factors including:

- "1. Prior relationship with or knowledge of the defendant.
2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor[s] affecting sensory perception and proximity to the alleged criminal act.
3. Length of time between the offense and the disputed identification. . . .
4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description.
5. Any previous proper identification or failure to identify the defendant.
6. Any identification prior to lineup or showup of another person as defendant.
7. . . . [T]he nature of the alleged offense and the physical and psychological state of the victim. . . .
8. Any idiosyncratic or special features of defendant."<sup>15</sup>

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<sup>14</sup> *People v Anderson*, 166 Mich App 455, 478; 421 NW2d 200 (1988).

<sup>15</sup> *Gray*, *supra* at 116, quoting *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977) (brackets in quote provided by the *Gray* Court).

With regard to Malloy, several of the *Kachar* factors weigh in favor of finding that Malloy's in-court identification of Wallace had an independent basis: Malloy had five to ten minutes of face-to-face interaction with Wallace during the hotel check in process; it was only a "couple of days" between the offense and disputed identification; Malloy never failed to identify Wallace when given the opportunity to do so nor did she ever identify the wrong person; and, because Malloy was not aware that a crime had occurred, she was not under the stress that can sometimes affect the victim's perception of the perpetrator. While the first, fourth, and eighth *Kachar* factors do not help support an independent basis for Malloy's in-court identification, they also do not preclude the finding of an independent basis. Given that several of the *Kachar* factors weigh in favor of finding that Malloy's in-court identification had an independent basis and none of the factors clearly weigh against Malloy's identification, we conclude that an independent basis existed for Malloy's in-court identification of Wallace.

Admittedly, Henderson's in-court identification is less likely to have an independent basis because she was not able to recall as many details about her interaction with Wallace, her prior description of the perpetrator may not have been complete, and she did not have as long of an interaction with Wallace as did Malloy. However, even if it was error for the trial court to admit Henderson's identification testimony, the admission was harmless beyond a reasonable doubt because Henderson's identification of Wallace was "merely cumulative in nature."<sup>16</sup> In *People v Solomon*, this Court held that the admission of a witness's identification testimony, which raised reliability concerns, was harmless error beyond a reasonable doubt.<sup>17</sup> The *Solomon* Court reasoned that given the "overwhelming evidence of guilt, including the testimony of several other witnesses who positively identified [the] defendant as the assailant, [the witness's] identification was merely cumulative in nature and therefore harmless."<sup>18</sup> Here, Malloy's identification testimony, combined with the circumstantial evidence involving Wallace's vehicle being spotted at the scene of the crime, was evidence that, if believed by the jury, proved Wallace's guilt. Moreover, Malloy's testimony was more significant than Henderson's testimony in proving Wallace's guilt given the length of time Malloy spent with Wallace, her ability to remember the details of her interaction with Wallace, and her conviction in identifying Wallace's photograph from the lineup. Thus, even if Henderson's identification testimony had been admitted in error, this error was harmless beyond a reasonable doubt.

Affirmed.

/s/ Helene N. White  
/s/ William C. Whitbeck  
/s/ Alton T. Davis

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<sup>16</sup> *People v Solomon (Amended Opinion)*, 220 Mich App 527, 531; 560 NW2d 651 (1996).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*